

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

_____)	
)	
UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	C.A. No.
v.)	Filed:
)	Judge ^{is} :
XTO ENERGY, INC.,)	
)	
Defendant.)	
_____)	

COMPLAINT

The United States of America, by authority of the Attorney General of the United States and through the undersigned attorneys, acting at the request of the Administrator of the United States Environmental Protection Agency (“EPA”), files this Complaint and allege as follows:

PRELIMINARY STATEMENT

1. This is a civil action against XTO Energy, Inc. (“Defendant”) seeking injunctive relief and a civil penalty for violating the Clean Water Act (“CWA”), 33 U.S.C. §§ 1251, et seq., at Defendant’s natural gas well pad and storage facility located at 301 Marquardt Road, in Hughesville, Lycoming County, Pennsylvania. The United States seeks: (1) a penalty under Section 309(d) of the CWA, 33 U.S.C. 1319(d), for unauthorized discharges of flowback fluid and produced fluid, contaminated with pollutants including barium, calcium, iron, magnesium, manganese, potassium, sodium, strontium, bromide, chloride, and total dissolved solids, into waters of the United States from tanks and valves associated with Defendant’s hydraulic

fracturing operations; and (2) injunctive relief requiring Defendant to perform actions to remedy conditions that caused the discharges and to prevent future discharges.

JURISDICTION AND VENUE

2. This Court has jurisdiction over the matter pursuant to Section 309(b) of the CWA, 33 U.S.C. § 1319(b) and 28 U.S.C. §§ 1331, 1345 and 1355.

3. The United States has authority to bring this action on behalf of the Administrator of EPA (“Administrator”) under Section 506 of the CWA, 33 U.S.C. § 1366, and under 28 U.S.C. §§ 516 and 519.

4. Notice of commencement of this action has been given to the Commonwealth of Pennsylvania pursuant to Section 309(b) of the CWA, 33 U.S.C. § 1319(b).

5. Venue is proper in the Middle District of Pennsylvania pursuant to Section 309(b) of the Clean Water Act, 33 U.S.C. § 1319(b), and 28 U.S.C. § 1391(b) as this is a judicial district within which Defendant is doing business and within which the claims arose.

DEFENDANT

6. Defendant is a corporation organized under the laws of Delaware with its principal place of business located at 810 Houston Street, Fort Worth, Texas. Defendant operates a domestic energy company focused on oil and natural gas production, including hydraulic fracturing operations in the Marcellus shale corridor in Pennsylvania and West Virginia.

7. Defendant is a “person” as defined by Section 502(5) of the Clean Water Act, 33 U.S.C. § 1362(5).

STATUTORY FRAMEWORK

8. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant from a point source to waters of the United States except as authorized by, and in compliance with, certain enumerated sections, including Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342.

9. Pursuant to Section 402 of the CWA, 33 U.S.C. § 1342, the Administrator may issue a National Pollutant Discharge Elimination System (“NPDES”) permit which authorizes the discharge of pollutants to waters of the United States, upon the condition that such discharge will meet all applicable requirements of the CWA.

10. Section 502(12) of the CWA, 33 U.S.C. § 1362(12), defines “discharge of a pollutant” to include “any addition of any pollutant to navigable waters from any point source.”

11. Section 502(6) of the CWA, 33 U.S.C. § 1362(6), defines “pollutant” to include “dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.”

12. Section 502(14) of the CWA, 33 U.S.C. § 1362(14), defines “point source” to mean “any discernible, confined, and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.”

13. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines “navigable waters” as “the waters of the United States, including the territorial seas.”

14. The term “waters of the United States” as defined in 40 C.F.R. § 122.2 includes but is not limited to traditional navigable waters, interstate waters, and tributaries of such waters.

15. Section 309(b) of the CWA, 33 U.S.C. 1319(b), authorizes the Administrator to commence a civil action for appropriate relief for any violation for which he is authorized to issue a compliance order under Section 309(a) of the CWA, 33 U.S.C. § 1319(a).

16. Section 309(d) of the CWA, 33 U.S.C. 1319(d), and 40 C.F.R. § 19.4 provide that any person who violates Section 301 of the Clean Water Act, 33 U.S.C. § 1311, shall be subject to a civil penalty not to exceed \$32,500 per day for each violation that occurred between March 15, 2004 and January 12, 2009 and \$37,500 per day for each violation that occurred January 13, 2009 and after.

GENERAL ALLEGATIONS

17. At all times material to this Complaint, Defendant has engaged in activities associated with the exploration and production of natural gas at facilities throughout Pennsylvania and West Virginia.

18. Defendant operated a well pad and storage facility at 301 Marquardt Road, in Hughesville, Lycoming County, Pennsylvania (the “Facility”).

19. At this Facility, Defendant conducted hydraulic fracturing. Hydraulic fracturing is a process used to release natural gas from, in this instance, the Marcellus shale formation that involves injecting liquids into wells at high pressure to cause fractures in the shale through which gas and/or oil can flow and ultimately be captured. During this process, the liquid injected into

the wells generates a byproduct known as flowback fluid. In addition, wells also generate wastewater as a byproduct from the production of natural gas called produced fluid. The flowback fluid and produced fluid contain brine, proppant, hydraulic fracturing chemicals, dissolved solids, heavy metals and radionuclides.

20. At the Facility, Defendant stored the flowback fluid and produced fluid in portable tanks, known as Baker Tanks, to be recycled and then reused in its fracturing operations at various wells throughout Pennsylvania and West Virginia. Defendant used mobile treatment equipment to recycle the produced water from the Baker Tanks and at times stored produced water to be transported off site to be recycled, so that the produced water can be reused.

21. On November 16, 2010, a state inspector conducted an inspection at the Facility. At this time, Defendant had approximately 57 Baker Tanks on the well pad at the northwest side of the Facility, each having a capacity of 21,000 gallons. Defendant did not have the mobile treatment equipment at the Facility on this date.

22. It was raining heavily during the inspection on November 16, 2010, and rainfall records in the area show that it rained before the inspection and continued after the inspection.

23. The state inspector observed an open valve on a 21,000 gallon Baker Tank. The contents of the Baker Tank were being released to the ground. That Baker Tank was connected internally to five other Baker Tanks, all of which stored flowback fluid and produced fluid. The flowback fluid and produced fluid stored in the Tanks contained, among other things: barium, calcium, iron, magnesium, manganese, potassium, sodium, strontium, bromide, chloride, total dissolved solids.

24. The flowback fluid and produced fluid released from the Baker Tank flowed overland to the drainage basin for the Lower Branch of the Susquehanna River. It also drained through the surface soils and into groundwater, which was then released in seeps to a spring and an unnamed tributary known as Tributary 19617.

25. Upon information and belief, the released contaminated flowback fluid and produced fluid traveled overland from the release to a depression which contains a natural fracture with a hydrological connection to the spring. Along this surface pathway, the produced water migrated overland to Tributary 19167 and downward through the stratus to a natural fracture. Once fluid entered the fracture system, it continued in a downward movement, recharged groundwater over time, and seeped into the Tributary 19617 by way of the spring referenced in Paragraph 24. Tributary 19617, comprised of the comingled streams, flows to Sugar Run. From there Sugar Run flows to Muncy Creek. Muncy Creek flows to the Susquehanna River. Sampling conducted after the release into Tributary 19617 and the unnamed spring showed that for up to sixty-five days pollutants associated with natural gas extraction, such as total dissolved solids, strontium, barium, bromides and chloride, were present.

26. The unnamed spring has characteristics which form a defined, at least seasonal, channel with intermittent flow to Tributary 19617. Tributary 19617 has regular seasonal flow, a high water mark, a defined bed and bank. Tributary 19617 flows to Sugar Run – a perennial water, which flows to Muncy Creek - a perennial water, and finally the Susquehanna River – a perennial water.

27. The Baker Tanks are “point source[s]” within the meaning of CWA Section 502(14), 33 U.S.C. § 1362(14).

28. Defendant's released flowback fluid and produced fluid, which contains barium, calcium, iron and other contaminants mentioned in Paragraph 23, constitutes one or more of the following: "solid waste, chemical wastes, biological materials, radioactive materials, rock, sand, and/or industrial waste" and thus qualifies as a pollutant within the meaning of Section 502(6), 33 U.S.C. § 1362(6).

29. Tributary 19617, the unnamed spring, Muncy Creek, Sugar Run and the Susquehanna River into which Defendant discharged pollutants are "navigable waters" within the meaning of Section 502(7), 33 U.S.C. § 1362(7).

30. Defendant's discharge of flowback fluid and produced fluid from the Baker Tank to the navigable waters referenced in Paragraph 29 constitutes the "discharge of a pollutant" within the meaning of Section 502(12), 33 U.S.C. § 1362(12).

CLAIM FOR RELIEF

(Defendant discharged pollutants to navigable waters without an applicable permit)

31. The allegations of Paragraphs 1-30 are realleged and incorporated herein by reference.

32. Defendant's discharge of contaminated flowback fluid and produced fluid described above constitutes a discharge of pollutants from a point source to navigable waters without authority under any CWA permit in violation of Section 301(a), 33 U.S.C. § 1311(a).

33. Unless enjoined, Defendant's violations of the Clean Water Act will continue or will recur at this or other facilities operated by the Defendant.

34. Pursuant to 33 U.S.C. § 1319, Defendant is liable for injunctive relief and penalties up to \$37,500 per day for each violation occurring after January 12, 2009.

PRAYER FOR RELIEF

WHEREFORE, the United States respectfully request that this Court:


1. Order Defendant to comply with the CWA and perform injunctive relief as necessary to prevent future discharges and to protect and restore waters of the United States pursuant to Section 309(b) of the Act, 33 U.S.C. § 1319(b);
2. Assess appropriate civil penalties against Defendant for violating section 301(a) of the CWA, 33 U.S.C. § 1311(a), in the amount of up to \$37,500 per day per violation, as permitted by law, up to the date of judgment herein, pursuant to Section 309(d) of the CWA, 33 U.S.C. § 1319(d), and 40 C.F.R. part 19;
3. Order Defendant to take all steps necessary to redress or mitigate the impact of its violations;
4. Award the United States its costs of this action; and
5. Award such other and further relief as the Court may deem just and proper.

Respectfully submitted,

FOR THE UNITED STATES OF AMERICA

ROBERT G. DREHER
Acting Assistant Attorney General
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice

Date: 6-26-13


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Date: 07/18/2013

s/Mark E. Morrison
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OF COUNSEL:

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US EPA Region III

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

United States of America

(b) County of Residence of First Listed Plaintiff _____
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)
Mark Morrison, USAO Middle District of PA, 717-221-4482, 228 Walnut Street, Suite 220, Harrisburg, PA 17108; Cara Mroczek U.S. Dept of Justice. 202-514-1447, 601 D. Street NW, Washington DC 20004

DEFENDANTS

XTO Energy, Inc.

County of Residence of First Listed Defendant Lycoming County
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)
James Becker, Two Liberty Place, 50 S. 16th St., Suite 3200 Philadelphia, PA 19102, 215-665-5366

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☒ 1 U.S. Government Plaintiff
- ☐ 2 U.S. Government Defendant
- ☐ 3 Federal Question
(U.S. Government Not a Party)
- ☐ 4 Diversity
(Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

	PTF	DEF		PTF	DEF
Citizen of This State	1	1	Incorporated or Principal Place of Business In This State	4	4
Citizen of Another State	2	2	Incorporated and Principal Place of Business In Another State	5	5
Citizen or Subject of a Foreign Country	3	3	Foreign Nation	6	6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS		FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	PERSONAL INJURY <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input checked="" type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	PRISONER PETITIONS Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

V. ORIGIN (Place an "X" in One Box Only)

- ☒ 1 Original Proceeding
- ☐ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from Another District (specify)
- ☐ 6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
Clean Water Act, 33 U.S.C. § 1251 et. seq.

Brief description of cause:

civil action for recovery of a penalty and injunctive relief for a violation of the Clean Water Act

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE

07/18/2013

SIGNATURE OF ATTORNEY OF RECORD

/s/ Mark Morrison

FOR OFFICE USE ONLY

RECEIPT #

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MAG. JUDGE

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